

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2014AP002601 CR
Dodge County Circuit Court Case No. 2013CT000398

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD S. FOLEY,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT DENYING DEFENDANT-APPELLANT'S
MOTION FOR SUPPRESSION OF EVIDENCE IN THE
CIRCUIT COURT FOR DODGE COUNTY, THE
HONORABLE STEVEN G. BAUER, PRESIDING**

**THE REPLY BRIEF AND APPENDIX OF THE
DEFENDANT-APPELLANT RICHARD S. FOLEY**

**By: Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997**

**Piel Law Office
500 W. Silver Spring Drive
Suite K-200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)**

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Excerpts from Motion Hrg.- 06/04/2014. . . ReplyApp 1

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United States Supreme Court

Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75
L.Ed.2d 229 3

ARGUMENT

The State implies that Mr. Foley “argues that he was under arrest [solely] because he was told that he could not go into his house until the investigation was complete.” *Brief of the Plaintiff- Respondent* page 7. This contention is disingenuous. At no point does Mr. Foley claim that an arrest occurred when Officer Yahnke told him he could not go into his house. Obviously, an officer commanding a defendant to stay at the scene of an investigative stop does not transform the detention into an arrest. However, the Officer’s conduct here was significantly more intrusive. Mr. Foley’s argument is that this was but one of the several factors that would have contributed to a reasonable person in Mr. Foley’s position concluding that he was in custody.

In addition to stopping Mr. Foley from walking into his house, Officers also patted Mr. Foley down, placed him in the rear of a locked squad car, informed him that he was being detained, detained him for thirty two minutes in the locked squad car and subsequently transported him to the police department. Mr. Foley’s argument is that based on the level of restraint, a reasonable person would have concluded that he was not free to leave and that he was in custody.

At the moment when Mr. Foley was transported from the scene “[a]s a practical matter, [Mr. Foley] was under arrest.” *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). The encounter between Officers and Mr. Foley was no longer consensual.

Furthermore, “the officer’ conduct was more intrusive than necessary to effectuate an investigative detention...” *Id.* at 504. There were multiple officers on the scene. By Officer Yahnke’s own admission, there were at least three officers present, Officer Yahnke, Johnson and Lieutenant Roy. (R.28:20 / ReplyApp 1). Anyone of the three officers could have immediately transported Mr. Foley to the police department, to quickly and diligently confirm or dispel their suspicions that Mr. Foley was operating his motorcycle while impaired. Thus, contrary to the State’s contention, it was not necessary to detain Mr. Foley for thirty-two minutes while Officer Johnson investigated whether Mr. Thompson was impaired.

CONCLUSION

Because the circumstances of Mr. Foley's detention amounted to an arrest, and because that was not justified by probable cause, the trial court erred when it denied Mr. Foley's motion for suppression of evidence. The court should reverse the trial court's ruling and the judgment of conviction.

Dated this 17th day of March, 2015.

Respectfully Submitted

Piel Law Office

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:
500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 10 pages. The word count is 1270.

Dated this 17th day of March, 2015.

Respectfully Submitted

Piel Law Office

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:
500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

**CERTIFICATION OF COMPLIANCE WITH RULE
809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of March, 2015

Respectfully submitted,

Piel Law Office

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 17th day of March, 2015.

Respectfully submitted,

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX